91-1144

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

TERM

PETER N. STARR
Petitioner

vs.

THE CITY OF ALTOONA and ALAN R. MIKULA, MAYOR,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DUE PROCESS CLAUSE ENTITLES AN AT-WILL PUBLIC EMPLOYEE ACCUSED OF CORRUPTION TO A HEARING ON HIS DEMOTION?

II. WHETHER THE IMPOSITION OF A GAG ORDER ON A PUBLIC EMPLOYEE ACCUSED OF CORRUPTION VIOLATES HIS FIRST AMENDMENT RIGHTS TO FREE SPEECH AND ASSOCIATION?

III. WHETHER AN EMPLOYER'S PRE-EXISTING ILL WILL AND A DESIRE TO DEMOTE ESTABLISH AS A MATTER OF LAW THAT THE EMPLOYEE'S SUBSEQUENT PROTECTED ACTIVITY CANNOT BE A SUBSTANTIAL OR MOTIVATING FACTOR FOR RETALIATORY ACTION UNDER MT. HEALTHY V. DOYLE?

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42 U.S.C §1983 . . . . . 12, 17-19

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OPINIONS BELOW

The opinion of the District Court granting Respondents' Motion for a Directed Verdict (Appendix A, infra, pp. 3a-9a) was not reported. The oral opinion of the District Court granting Respondents' Motion for Summary Judgment (Appendix A, infra, pp. 1a-2a) was not reported. No opinion was rendered by the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized int he United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Article I § 1 of the Pennsylvania Constitution provides:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

STATEMENT OF JURISDICTION

Counsel for Appellant, Peter N. Starr, certifies that pursuant to 28 U.S.C. Section 1254(1) this Court has jurisdiction over the instant appeal from the Order entered by the United States Court of Appeals for the Third Circuit, dated August 1, 1991, denying Appellant's Petition For Rehearing.

STATEMENT OF THE CASE

Petitioner, a fifteen year veteran of the police force, was appointed to the position of Chief of Police of the City of Altoona, Pennsylvania, in 1984. His relationship with Respondent mayor following his election in 1987 could best be described as tempestuous. In November of 1988 Respondent mayor summarily demoted Petitioner for communication and departmental morale problems he attributed to Petitioner - a demotion that culminated in a reinstatement several days later following pressure from Altoona City Council. Between November and March of 1989 a semblance of calm endured, in spite of efforts by Respondent mayor to discredit Petitioner by whispering to reporters and at least one member of city council that Petitioner was corrupt, and distributing reports to council describing Petitioner's alleged deficiencies. Respondent

mayor attempted to enlist support from members of city council for another demotion with this negative information, but was rebuffed by two of the four councilmen he approached; a third councilman affirmed that he too would not support a demotion on the information provided, thus denying Respondent mayor the support of the majority.[1]

On March 6, 1989, Petitioner heard a rumor that he was going to be demoted again, but a call to Respondent mayor's secretary produced a denial of any knowledge of an impending demotion. The same day, while still occupying the chief's position, and without warning or discussion, Petitioner received the following written order from the Respondent mayor:

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[1] Petitioner acknowledges that as an employee-at-will he served at the whim of Respondent, and that city council's support was not legally necessary for an adverse employment action.

TO: Peter N. Starr

FROM: Mayor Alan R. Mikula

DATE: March 7, 1989

You are hereby ordered not to hold any press conferences or hold any discussion with any member of the media. You are not to be photographed or video recorded.

This order is to be kept strictly confidential. This order is effective immediately.

Notwithstanding the directive on confidentiality, Petitioner disclosed the contents of the order to his wife as it was read upon opening. The following day, in the absence of any communication from Respondent mayor concerning the purpose of the gag order, Petitioner and his wife attended a public meeting of Altoona City Council to attempt to gain an understanding of these events. During the meeting Respondent mayor refused to acknowledge the existence of the gag order, prompting Petitioner's wife to present a copy of the order to a member of the press, who read it

aloud. Respondent mayor then declared that the disclosure of the order by Petitioner was insubordination, and less than two hours later demoted him to the position of sergeant. He acknowledged the next day in a public meeting of city council that he felt that he had little choice but to demote Petitioner after his disclosure of the order.

At the time of the issuance of the gag order there was an ongoing internal investigation of the Altoona Police Department relating to allegations of corruption. Following its public disclosure, when asked to explain the reason for the demotion of Petitioner, Respondent mayor publicly declared, in part, that "I don't think it serves the public interest to air the police's dirty laundry in public". Believing that the statements and actions of Respondent mayor and the circumstances surrounding the demotion communicated to the public that he was guilty of wrongdoing, Petitioner requested permission to

hold a news conference on March 8, 1989. Permission was denied and he was advised that the gag order was still in effect.

Petitioner worked for only a brief period of time as a sergeant in the department, then resigned. He later secured a position with the Pennsylvania Crime Commission as an investigator earning approximately $10,000.00 less per year.

Petitioner filed suit on March 20, 1989, challenging the constitutionality of the gag order under 42 U.S.C. §1983 and his subsequent demotion without due process (see Petitioner's Complaint at App. A, 13a-15a). He sought injunctive relief on the gag order, and civil and equitable remedies for the damages associated with the demotion and order. On March 23, 1989, Respondent mayor removed the gag. In their Answer Respondents denied that Petitioner's constitutional rights had been violated and raised the defenses of privilege, justification, mootness based upon the withdrawal of the order, the lawfulness and

propriety of the order, and immunity. On or about November 3, 1989, Defendants filed a motion for summary judgment that was dismissed by the lower court by an order dated April 6, 1990.

On the morning of January 14, 1991, prior to the commencement of the trial, the lower court, in responding to a motion in limine directed at Petitioner's evidence on the due process issue, dismissed the due process claim on the grounds Petitioner had not lost a right or status guaranteed to him by state law or the Constitution (App. A, 1a-2a). The trial then commenced on the afternoon of January 14, 1991.

At the close of Petitioner's case-in-chief on January 17, 1991, the lower court granted Respondents' motion for a directed verdict (App. A, 10a) but in its written opinion only discussed the retaliation claim; the court neither acknowledged nor discussed the existence of First Amendment violations unrelated to the demotion in its opinion (App. A, 3a-9a). The

lower court based its dismissal of the retaliation claim on Petitioner's purported failure to establish that the violation of the gag order was a substantial or motivating factor in the decision to demote as required by Mt. Healthy v. Doyle, 429 U.S. 274, 287, 97 S.Ct 568, 50 L.Ed. 2d 471 (App. A, 8a-9a).

The Third Circuit affirmed the lower court's decision without a written opinion.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner submits (1) that the lower courts have decided federal questions of great importance that have not previously been determined by this Court, and that (2) the decisions of those courts are inconsistent with prior decisions of this Court.

1. The Federal Question Regarding Petitioner's Due Process Claim Has Been Decided Below in a Way Which Is Not in Accord With the Applicable Decisions of This Court.

This case presents several important questions concerning the scope of protection available to a government employee under 42 U.S.C §1983 for defamatory conduct toward him by a government employer or supervisor. The lower court has declared that an employee in Pennsylvania accused of corruption then demoted has no due process protection where he has no legal right to the position. As a result, at-will government employees may be subjected to

untested accusations and adverse employment action without any recourse.

This restrictive decision is seriously at odds with prior decisions of this Court and the Third Circuit. In its discussion of the scope of a "liberty interest" due process claim founded upon defamation, this Court ruled in Paul v. Davis, 424 U.S. 693, 710-712, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) that an employee must show that the defamation occurred in connection with the alteration or extinguishment of a right or status protected by state law or the Constitution. Although that claimant's due process claim founded upon damage to reputation failed (the police distributed flyers describing him as an "active shoplifter"), his failure occurred because "Kentucky law does not extend to respondent any legal guarantees of present enjoyment of reputation which has been altered as a result of petitioners' actions". Paul at 711-712. Unlike Kentucky, Pennsylvania affords constitutional protection to reputation.

Article I § 1 of the Pennsylvania Constitution provides that:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and **reputation**, and of pursuing their own happiness.

The decision of the lower court to deny due process protection in the face of this explicit constitutional provision is even more perplexing considering the Third Circuit decision of McKnight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229 (1978), where Paul was followed and this very provision of the Pennsylvania Constitution was utilized to protect the liberty interest of a government employee dismissed for alleged intoxication on the job.[2] A second result of

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[2] Clark v. Township of Falls, 890 F.2D 611 (1989), the decision relied upon by the lower court in the instant case to deny the due process claim, failed to mention this separate constitutional basis for satisfying the "change or alteration" requirement of Paul v. Davis, supra.

the lower court decision, which occurred in the absence of any consideration of the Pennsylvania Constitution, is that at-will status as a government employee will deny the employee protection under the Due Process Clause. A literal reading of the "alteration or extinguishment" rule of Paul could support that conclusion, but such a broad interpretation would conflict with earlier decisions relied upon by this Court in deciding Paul, and would deny many government employees any protection from adverse action that may be damaging to their reputations. In Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court stated that it would have been willing to provide due process protection to an untenured employee if the refusal to renew his contract had been based upon charges of dishonesty or immorality, a position the Court expressly reaffirmed in the later case of Codd v. Velger, 429 U.S. 624, 628, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977) (per curiam), where the Court

stated that a government employee is entitled to due process "if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination. . ."

These cases recognized that government employment is an important status, and that adverse governmental action toward that status begets serious consequences. To the extent that Paul v. Davis, supra, may be construed to have eliminated due process protection for at-will government employees, as it has been by the lower court, Petitioner believes that a review by this Court is imperative.

2. The Denial of A Cause of Action Under 42 U.S.C.§1983 For A Violation of Petitioner's First Amendment Rights By the Imposition of a Blanket Gag Order Is Not in Accord With Prior Decisions of This Court.

The question of whether an accused government employee subjected to a blanket gag order by his employer has a cause of action under 42 U.S.C. §1983 for a violation of his First Amendment rights is a question of great importance on a fundamental constitutional right. The consequences of enforced silence, while simultaneously permitting the government a free tongue, are immense to the accused.

The specific issue of the propriety of a gag order under the circumstances of this case has not been addressed by this Court, but significant authority exists for recognizing Petitioner's claim under 42 U.S.C. §1983. The principle that a public employee does not lose his First Amendment rights upon hiring is indisputable (". . .a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue

of government employment", Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)), as is the First Amendment's application to the right of association (Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979)). An equally basic principle is that 42 U.S.C. §1983 authorizes civil actions for those whose rights are deprived under color of law (supra at p. 2).

Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968), delineated the criteria for striking a proper balance between the interests of employer and employee when restrictions on speech are imposed[3], but did not involve allegations of wrongdoing or a gag order (Pickering was a retaliation for speech case). However, had this analysis been performed in the instant case (which would have required an examination of such factors as content, employee harmony,

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[3] This analysis was not conducted by the lower court.

discipline, loyalty, Pickering at 70, 88 S.Ct. at 1735-1736) the inescapable conclusion would have been that police corruption at the very top of the department is a salient public issue that transcends personnel or confidentiality matters and justifies public comment, at least where the employer-accuser chooses to divulge the charges to the public.

An alternate basis for Petitioner's §1983 claim is Paul v. Davis, supra, which, as previously discussed, sets the standard for a liberty interest due process claim under 42 U.S.C. §1983 for governmental defamation. The requirement that an employee must show that the defamation occurred in connection with the alteration or extinguishment of a right or status protected by state law or the Constitution (Paul at 710-712) to have recourse under 42 U.S.C §1983 can be satisfied by the violation of Petitioner's First Amendment rights of free speech and association through the imposition of the gag order.

Implicit in the lower court decisions in this case is the conclusion that a finding of "no retaliation" precludes a cause of action under this statute for the use of the gag order, even where damage to reputation may follow. Petitioner believes that this conclusion markedly deviates from established precedents of this Court recognizing these very basic rights.

3. **The Lower Court Misapplied This Court's Test in Mt. Healthy v. Doyle For Petitioner's Claim Under 42 U.S.C. §1983 for Retaliation Against Protected Activity.**

The lower court concluded in this case that a "substantial" or "motivating" factor cannot be shown as a matter of law, even in the face of a glaring admission that the protected activity left the Respondent mayor with no choice but to demote, where there is pre-existing ill will and a desire to demote. This Court's ruling in Mt. Healthy v. Doyle, supra at 287, only required proof that the protected activity was "a" motivating factor, not "the" motivating factor, after which the employer was required to show by a preponderance of the evidence that the demotion would have occurred absent the protected activity. If evidence of problems between an employer and employee prior to the occurrence of the protected activity and subsequent employment action can be used to negate the conclusion that an employee has met his burden of proof, employers will rarely be

required to show that the action would have been taken anyway, and instead will able to rely upon the almost universal ability to generate subjective pretextual evidence.

This Court's unequivocal recognition of the right of an untenured school teacher to protection for engaging in protected activity (Mt. Healthy at 284) was disregarded in the lower court's dismissal of Petitioner's argument (App. A at 8a) that the violation of the gag order was a substantial factor because it was the excuse the Respondent mayor needed to give effect to his ill will. The lower court concluded that the Respondent did not need an excuse because, in part, he had the right to demote Petitioner.[4] Underlying this reasoning

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[4] The lower court also concluded that there was no evidence presented to establish that the gag order violation was used because Respondent wanted council approval; Petitioner never claimed he wanted approval, but only that he wanted to avoid the public and council pressure he was subjected to on the prior demotion. The violation of the gag order gave him the justification he needed.

is the undesirable conclusion that an at-will employee has less protection because the employer has the right to demote or dismiss. This type of reasoning would further facilitate the use of pretextual means to dismiss employees by permitting employers to simply point to earlier behavior and the at-will status, then stand on their "right" to take action, rather than having to prove that it was actually going to be done notwithstanding the occurrence of protected activity.

The clear rationale for adding the third step to the retaliation test in Mt. Healthy v. Doyle was to avoid giving an employee the opportunity to better his position by engaging in such activity (Id. at 286); this decision undermines the equally clear goal of this Court in insuring that "A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct." Id. Because marginality will always produce some

negative history, the only way to protect both parties where protected conduct has played a demonstrable role in the decision-making process is to proceed to the third stage of the test.

CONCLUSION

The petition for a writ of certiorari should be granted.

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THE COURT: Well, here is the feeling of the court and the analysis of the court. The court is of the view that, because of footnote 3, found on page 620 of the Clark versus Township of Falls case, that the case of Clark versus Township of Falls is not on all fours with this case, that it is a somewhat dif.ferent case, and the Third Circuit said in that footnote they don't express any opinion on whether reduction in rank is the alteration of a legal right sufficient when coupled with the harm to reputation to create a liberty interest. They say that point is open.

Now, this court has to make a ruling on something that is really open, but we think from reading Clark versus Township of Falls that the language the court used on page 619, it indicates that defamation is actionable under Section 1983 only if it occurs in the course of or is accompanied by change or extinguishment of a right or status guaranteed by state law or the Constitution.

We don't think that the right of Mr. Starr who is in the position of chief of police or sergeant was something that was a right or status guaranteed to him by state law or the Constitution. Therefore, the court is going to grant the motion of the defendant to technically preclude evidence of the due process claim, but which we really think ought to be converted for the record and purposes of appeal into a motion to dismiss the due process claim in this lawsuit in its entirety.

MR. ANDERSON: I would make that motion, Your Honor.

THE COURT: And, of course, I am sure counsel has some objection to that motion. The record would reflect that he has the same objection. But the court would grant that motion to dismiss that part of the plaintiff's claim.

We have a jury and the motions done. Ready to go?

MR. ANDERSON: A couple of items. Just for the record, if the due process claim has been stricken, Your Honor, then I believe that the claim for damage to the reputation -- any evidence to damages for reputation should be precluded because the allegation of a due process claim was based on distinguishment of a due property right and liberty interest.

Since he does not have the liberty interest, he cannot produce evidence of that. I think any testimony that would go to damage testimony that would address his reputation or --

THE COURT: Well, I think it is important in this record to distinguish where we are in one regard. I don't think there is any longer, in view of the court's ruling, a claim for defamation. I think the defamation has been ruled out by the court's ruling.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PETER N. STARR, Plaintiff	)	
v.	)	Civil Action No. 89-53 Johnstown
THE CITY OF ALTOONA, and ALAN R. MIKULA, MAYOR, Defendants	)	

MEMORANDUM OPINION

The court has before it defendants motion for a directed verdict under Federal Rule 50(a). The standard under rule 50(a) is very much like that under summary judgment: This court must determine whether there is sufficient evidence supporting the non-movant's version of the facts. As the Third Circuit and the Supreme Court have both noted, it is not helpful to argue whether "some evidence" is sufficient evidence, or whether there must be "substantial evidence", or perhaps, "more than a mere scintilla." Instead, on a motion for directed verdict I must guard against a jury verdict

based on speculation. There must be some support for plaintiff's position other than mere conjecture; if there is not, then no reasonable jury could find for the plaintiff and the court must direct the verdict in defendant's favor. Galloway v. United States, 319 U.S. 372, 395 (1943); Lytle v. Household Mfr'g, 108 L.E.2d 504, 516-17 (1990) Columbia Metal v. Kaiser Aluminum, 579 F.2d 20, 25 (3d Cir. 1978); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 273 (1986); Chipollini v. Spencer Gifts, 814 F.2d 893, 896 (3d Cir. 1987).

This case is based on Peter Starr's claim that Mayor Mikula demoted him in retaliation for exercising his first amendment rights. The issues in this case have been taking shape since the complaint was filed, and many legal issues might prove to be complicated--whether the plaintiff's actions even qualify as protected speech, for example. Some issues, however, have been absolutely clear from the outset. All

parties cite and discuss the third circuit case of Trotman v. Board of Trustees of Lincoln University, 636 F.2d 216 (3d Cir. 1980) extensively throughout their briefs. This court, in its memorandum opinion of April 6th, 1990, also applied Trotman. Thus, it should come as no surprise that that case governs many of the issues in this one.

Trotman provides a three part test governing claims such as this one, that employers have retaliated against employees for exercising their First Amendment freedoms. The first part of the test asks whether the plaintiff has engaged in protected First Amendment activity. Here, the proposed protected activity is Starr's insubordinate disclosure to his wife of Mikula's confidential letter dated March 7, 1989. This was, of course, discovered when Mrs. Starr produced the letter at the Council meeting on the same date. It may be difficult to determine whether the disclosure along with Mrs. Starr's actions

constitute protected speech, but this court need not attempt to do so because plaintiffs have utterly failed to pass the second prong of Trotman.

The second prong of Trotman--an application of the principle announced by the Supreme Court in Mt. Healthy v. Doyle, 429 U.S. 274, 287 (1977)--states that "a claimant who demonstrates that the activity was protected must then show that the activity was a substantial or motivating factor in a decision or action taken against the claimant." In other words, even if Starr's insubordinate disclosure was protected speech, he must still introduce sufficient evidence that that particular action motivated or was a substantial factor in Mikula's decision to demote him. We think he has failed to do so.

There is ample evidence that Mikula was motivated by many factors other than the insubordination: poor police morale, Starr's alleged inadequate communication, Starr's alleged corruption, Starr's allegedly improper

question in a polygraph test, perhaps even Mikula's implied bad-faith. However, since the Mayor could demote the police chief for any reason at all other than for the Chief's exercising of his First Amendment rights, the particulars here are irrelevant except that they show reasons other than the insubordinate disclosure of the March 7th directive.

The court notes at the outset that Mikula wanted Starr out as far back as November 1988 when Mikula actually demoted Starr but was convinced to reinstate him by the Council. The council felt that the manner in which Starr was demoted was unsatisfactory. Plaintiff himself has introduced into evidence exhibit 12: a list, dated well before March 7, 1989, of specific grievances against Starr that Mikula complied in an attempt to satisfy the council's procedural concerns. It is not relevant that the grievances were minuscule or that people thought the list was a sham. Mikula may well have crafted this list in an effort to conceal a

hidden agenda, but retaliation against speech which had not yet occurred could not possibly have been on that agenda. We are not concerned with what Mikula's hidden reasons actually were, as long as they were not retaliatory against the insubordinate disclosure. The list of complaints does no more than show that Mikula was ready to fire Starr well before the insubordinate disclosure.

The same is true with the evidence of Kathy Mellott who testified that Mikula told her that Starr was corrupt; it is irrelevant that the accusation was false. Regardless of whether Mikula was justified in his displeasure with Starr, witness after witness has admitted that the two did not get along. Mrs. Starr herself admitted that long before the disclosure there "most definitely" was "some type of problem." In fact, she admitted that the week before the March 7th council meeting, Peter Starr told her that he had heard that he might be demoted; she also stated that before the 7th the Mayor had

been attempting to set up a meeting with Mr. Starr. We note also that the Mayor had letters of demotion and resignation drawn up on March 3, 1989 and again on March 7, 1989, both before Mrs. Starr's disclosure in the council meeting.

Plaintiff's own expert witness, Dr. Fraunces, testified that Mr. Starr was frustrated because he could not satisfy his superior. Moreover, according to Dr. Fraunces, Starr believed that his inability to satisfy the Mayor was the reason for his demotion.

Finally, Peter Starr himself admitted that Mikula wanted him out in November 1988 because of communication and morale problems. He also admitted that he had heard rumors of impending demotion from two people--one of them an undercover police officer--before the disclosure on March 7th. He admitted on cross-examination that soon after his reinstatement in November 1988, he heard that the Mayor still wanted to demote him. Moreover, he admitted that at 11:30 am on the morning of March 6th--a day before the

council meeting--he spoke with the Mayor's secretary about rumors of demotion. The secretary indicated that the Mayor was upset about Starr's involvement in a polygraph test. In fact, the hostilities were so strong that Starr informed the secretary that he might file harassment or 'official oppression' charges against Mikula.[1] Indeed, Starr was researching the relevant laws on these matters when he stopped into the council meeting where the insubordinate disclosure occurred.

In the face of all this evidence of animosity and ill will, plaintiff claims that the one disclosure by Starr to his wife, is what caused Starr to be demoted. Starr must do more than propose this, however. He must offer some proof. The only evidence which remotely suggests that the insubordination was any factor at all is the following leading question by a reporter at the Council meeting:

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[1] Apparently, Starr never filed those charges, and there is no allegation that Mikula retaliated against Starr for threatening to file them.

FEMALE VOICE: "Mr. Mayor, do you feel that you had little choice but to demote the chief after the incident in council chambers yesterday morning?"

Mayor Mikula: "Yes, quite frankly, yes."

This court can say with confidence that in the face of all the evidence that the demotion was motivated by Mikula's ill will towards Starr, this exchange is simply insignificant. Indeed, in the face of so much evidence of Mikula's displeasure with Starr, it is apparent that Starr has failed to produce sufficient evidence that his First Amendment activity was a substantial or a motivating factor in Mikula's decision to demote him on March 7, 1989.

Starr's other theory is that the disclosure provided the "excuse" that Mikula needed in order to fire Starr. While this may have been tenable at the summary judgment stage, such a theory has not been substantiated at all by the evidence presented. Mikula needed no excuse; by every party's admission the Mayor could demote

Starr without the council's approval. If Starr is alleging that Mikula used the insubordinate disclosure because he wanted council approval for other reasons, then it his burden to offer some proof of that. There is no evidence that Mikula sought or expected council approval. There is also no evidence that Starr's demotion was any more satisfactory to council members after the insubordination than before.

While this court may sympathize with the family of a fine police chief who's career might have been unjustifiably harmed by a spiteful Mayor, the case at bar is not about a career, a defamation, or spite. Plaintiff claims that he has been deprived of the most important of our cherished freedoms--the right to free speech. Peter Starr, while garnering our sympathy, has failed to show that his First Amendment activity had any significant role in the demotion. It must be remembered that plaintiff bears the burden of proving that it is more likely than not that the disclosure was a substantial factor

in the demotion. In the face of so much evidence of general dissatisfaction and discord, no reasonable jury could conclude that Mikula was motivated by Starr's isolated act of disclosing the letter to his wife. Accordingly, this court hereby grants a directed verdict in defendants' favor.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PETER N. STARR, Plaintiff	)	
v.	)	Civil Action No. 89-53 Johnstown
THE CITY OF ALTOONA, and ALAN R. MIKULA, MAYOR, Defendants	)	

O R D E R

AND NOW, this _____ day of January, 1991, for the reasons set forth in the accompanying memorandum opinion,

IT IS HEREBY ORDERED THAT:

(1) The motion of defendants THE CITY OF ALTOONA, and ALAN R. MIKULA, MAYOR, for a directed verdict under Federal Rule of Civil rocedure 50(a) is GRANTED.

(2) Judgment is entered in favor of THE CITY OF ALTOONA, and ALAN R. MIKULA, MAYOR, and against plaintiff PETER N. STARR.

_____
Glenn E. Mencer
United States District Judge

cm: All parties of Record _____

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3051

PETER N. STARR,

Appellant

v.

THE CITY OF ALTOONA and
ALAN R. MIKULA, MAYOR

Appeal from the United States
District Court for the
Western District of Pennsylvania
(D.C. Civ. No. 89-00053-J)
District Judge: Honorable Glenn E. Mencer

Submitted Under Third Circuit Rule 12 (6)
June 24, 1991
Before: MANSMANN and SCIRICA, Circuit Judges,
and POLLAK, District Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

* Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3051

PETER N. STARR,

Appellant

v.

THE CITY OF ALTOONA
and ALAN R. MIKULA, MAYOR

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, Circuit Judges and
POLLAK, District Judge.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

* Honorable Louis H. Pollak of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PETER N. STARR,	)	
	)	
Plaintiff	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 89-53J
	)	
THE CITY OF ALTOONA and ALAN R. MIKULA, MAYOR,	)	
	)	
Defendants	)	

AMENDED COMPLAINT

AND NOW comes the Plaintiff, Peter N. Starr, by and through his attorney, Stephen D. Wicks, Esquire, and files this Complaint against the Defendants alleging the following:

1.

That the jurisdiction of the United States District Court is invoked pursuant to 42 USC Section 1983 and is founded on Title 28 USC Sections 1343(3) and (4).

2.

That the Plaintiff is an individual who is and at all times relevant hereto was an employee

in the police department of the City of Altoona, Pennsylvania.

3.

That the Defendant, Alan R. Mikula, is and at all times relevant hereto was the Mayor of the City of Altoona and the supervisor of the Department of Public Affairs, which department includes the police department.

4.

That the Defendant, the City of Altoona, is a duly organized third class city under the laws of the Commonwealth of Pennsylvania.

5.

That the Plaintiff was appointed Chief of Police of the aforesaid police department on or about July 2, 1984, by former Mayor David L. Jannetta.

6.

That on March 6, 1989, while Plaintiff was employed in his position of Chief of Police, Defendant Mikula had delivered to Plaintiff's

home a written order to Plaintiff prohibiting him from holding any press conferences, holding any discussions with any member of the media, or being photographed or video recorded (copy attached and marked as Exhibit A), and Plaintiff was further directed in said order to keep it strictly confidential. Upon delivery said order was opened and read simultaneously by Plaintiff and his wife, Catherine A. Starr.

7.

That said order was promulgated by Defendant Mikula in his position as Mayor of the City of Altoona and under and pursuant to the policy-making authority and discretionary powers vested in him by law, and therefore Defendants were acting under color of statute, regulation, custom, and usage of the Commonwealth of Pennsylvania within the meaning of 42 USC Section 1983.

8.

That said order, which has continued in full force and effect from the aforesaid date of

issuance to the date of the filing of this Complaint, denies Plaintiff rights, privileges and immunities provided to him by the United States Constitution.

9.

That on March 7, 1989, Plaintiff and his wife attended a public meeting of the Altoona City Council where Defendant Mayor and Plaintiff were questioned by news reporters concerning the existence of said gag order. Following the refusal by Defendant Mikula to acknowledge the existence of said gag order, Catherine A. Starr presented a copy of the order to members of the press and it was thereafter read aloud at said meeting.

10.

That Defendant Mayor, at said meeting, publicly declared that the aforesaid disclosure by the said Catherine A. Starr constituted insubordination by Plaintiff and later that day, without discussion with Plaintiff and without

due process, removed Plaintiff from his position as Chief of Police and demoted him to the position of Sergeant.

11.

That the demotion of Plaintiff was effected for the purpose of retaliating against Plaintiff, in whole or in part, for his exercise of the rights of free speech and association under the United States Constitution.

12.

That on March 8, 1989 Plaintiff requested permission of the newly appointed Chief of Police, Jack Reilly, to hold a news conference for the purpose of publically proclaiming the absence of any wrongdoing by Plaintiff as the reason for the placement of the gag order or his dismissal, but said permission was denied.

13.

That on March 8, 1989, Defendant Mayor, in a televised public meeting, when asked whether any more information concerning Plaintff's

demotion would be released, responded in part by stating that "I don't think it serves the public interest to air the police's dirty luandry in public."

14.

That at the time of the Plaintiff's demotion on March 7, 1989, and at the time of the public statement by the Defendant Mayor set forth in Paragraph 13 above, it was public knowledge that an investigation was being conducted of the Altoona Police Department.

15.

That by virtue of the aforesaid unlawful acts and circumstances, Plaintiff has suffered and will continue to suffer humiliation, embarrassment, mental and emotional distress and anguish, loss of self-esteem, and harm to his personal and professional reputation.

16.

That as a further result of the aforesaid unlawful acts Plaintiff has suffered and will

continue to suffer a loss of income and fringe benefits.

WHEREFORE, Plaintiff demands judgment against Defendants jointly and severally for:

(1). Compensatory and punitive damages, costs, and reasonable attorney's fees;

(2). A preliminary and permanent injunction enjoining Defendants from interfering ith Plaintiff's rights of free speech and association, ordering Plaintiff to be reinstated to his previous position, and enjoining Defendants from engaging in any other acts violative of Plaintiff's rights;

(3). Such other and future relief that the Court may deem just and proper.

BY:_____

Stephen D. Wicks, Esquire
Attorney for Plaintiff
1126 Eighth Avenue, Suite 404
Altoona, PA 16602
Phone: (814) 946-4366

JURY TRIAL DEMANDED

Supreme Court, U.S.
FILED
FEB 6 1992
OFFICE OF THE CLERK

(2)

NO. 91-1144

IN THE SUPREME COURT OF THE
UNITED STATES

TERM

PETER N. STARR
Petitioner

VS.

THE CITY OF ALTOONA and ALAN R. MIKULA,
MAYOR,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC N. ANDERSON , ESQUIRE
Attorney for Respondents

2000 Frick Building
Pittsburgh , PA 15219
(412) 553-7071

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COUNTERSTATEMENT OF THE CASE[1]

The Respondent, the City of Altoona, is a third class city in the Commonwealth of Pennsylvania. Pursuant to the applicable Third Class City Code, the Mayor of the City retained the full and final authority over the appointment and discharge of the Chief of Police and the direct responsibility for the Police Department. 43 Pa. C.S.A. §37002.

The Petitioner, Peter N. Starr, joined the Altoona Police Department in 1969 as a patrolman and was appointed to the position of Police Chief in 1984. The individual Respondent, Alan R. Mikula, assumed the post of Mayor of the City of Altoona in December, 1987. The Altoona Police Department historically suffered from severe morale problems which stemmed from a lack of communication among the officers. In November, 1988, the Mayor, as a result of continuing morale and communication problems with the Petitioner, issued a written Order demoting the Petitioner to his previous rank of Sergeant. Within hours after his demotion, the Petitioner was photographed by a local newspaper

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[1]The Respondent includes this Counterstatement of the Case to address certain perceived omissions and misstatements of fact in the Petition for Writ of Certiorari.

photographer cleaning out his desk. Later that same day, several City Council members spoke to the Mayor about his reasons for demoting the Petitioner and the procedure utilized by the Mayor in the demotion. Within his discretion, the Mayor thereafter issued an oral directive reinstating the Petitioner as Chief of Police.

Immediately after the Petitioner's reinstatement, the Mayor met with members of the media, at which time he indicated his continued dissatisfaction with the Petitioner and reaffirmed his intent to demote the Police Chief. The Mayor also made two comments questioning the Police Chief's integrity. These comments were never reported nor were similar comments made after November, 1988. The problems between the Petitioner and the Mayor persisted and were evident to members of the City Council, the employees of the Police Department and the Petitioner himself. In February, 1989, the Mayor prepared and circulated among City Council members a memorandum which outlined his problems with the Petitioner, but which did not include any allegations of corruption.

During the week prior to March 7, 1989, the Petitioner was informed by two sources that his demotion was imminent.

Although he did not report to work on March 6, 1989, the Petitioner called the office of the Mayor twice, once to inquire about the rumors of his demotion and a second time in which he threatened to have the Mayor arrested or to take him to Court for harassment. Soon after these telephone calls, the Petitioner received a directive, as set forth in Petitioner's Statement of the Case, prohibiting any contacts with the media. Along with this directive was a letter scheduling an appointment between the Petitioner and the Mayor for the next morning. This meeting was later cancelled by the Mayor with the understanding it was to be rescheduled.

On March 7, 1989, the Petitioner and his wife attended a scheduled meeting of the City Council. During a question and answer portion of the Council meeting, a reporter questioned the Mayor regarding the memorandum directing that the Petitioner not hold discussions with the media. After the Mayor declined to comment on the issue, the Petitioner's wife handed a copy of the memorandum to the reporter and the contents were read to those attending the meeting. At that point, the Mayor stated that the reading of the memorandum constituted insubordination and

asked to see the Petitioner in his office immediately after the Council meeting. The Petitioner returned to his office for approximately one-half hour after the meeting before leaving the building, but did not report to the Mayor's office as had been requested. At approximately 11:00 a.m. on March 7, the Petitioner received notice of his demotion to his previous position of Sergeant.

At a public meeting of City Council the next day, the Mayor declined to comment on the reasons for the Petitioner's demotion, except to say:

> "Quite frankly, I don't think it serves the public interest to air the police's dirty laundry in public. Obviously, there are problems, there have been problems for quite some time, I felt that change was needed to improve police service in Altoona, and I think you are going to see within the next few months that police service will improve, and so all I can say at this point and all I will say is, wait and see."

In response to a question about whether he felt he had little choice but to demote the Petitioner after the incident in Council chambers the previous morning, the Mayor stated, "Yes,

quite frankly, yes." The Mayor also indicated that he had intended to speak with the Petitioner privately and that the meeting would have been to discuss his list of problems with the Petitioner and the demotion. No public comments were made by the Mayor or any other representative of the City of Altoona at that time or any time thereafter which linked the demotion with any charges of corruption or any internal investigation of the police department.

On March 23, 1989, the Mayor issued a letter specifically removing the restrictions on Petitioner regarding discussions with the media which was set forth in the March 7 memorandum. The Petitioner returned to work with the Altoona Police Department for only a brief period of time before resigning. He thereafter secured a position with the Pennsylvania Crime Commission as an investigator.

Petitioner filed a Complaint with the United States District Court for the Western District of Pennsylvania on March 20, 1989 alleging a violation of his right to due process and his First Amendment rights as a result of his demotion from the office of Police Chief. Trial of this case was scheduled to begin on

January 14, 1991. Prior to the commencement of the trial, Respondents filed a Motion in Limine requesting the Court to preclude any evidence on the due process issue. Upon an oral Motion to Dismiss, the District Court dismissed Petitioner's due process claims on the grounds that he did not have an interest or status guaranteed to him by State Law or the Constitution protected by the due process clause of the Fourteenth Amendment. After the close of the Petitioner's case in chief on January 17, 1991, the District Court granted Respondent's Motion for a Directed Verdict as to all the remaining claims.

The Petitioner contends that he had raised two distinct First Amendment claims and that the District Court failed to acknowledge or address the Petitioner's First Amendment claims except as they related to the demotion. However, one day after the grant of the Motion for Directed Verdict, the District Court amended its Memorandum Opinion to address this specific issue. (See Appendix B, infra. p. 1a). The District Court found that the Petitioner had neither raised nor tried the issue of a First Amendment violation separate and apart from the demotion. In addition, the District Court found that even if this issue had been raised, the Petitioner failed to present testimony sufficient to support the claim.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SECTION I

THE PETITIONER'S DUE PROCESS CLAIM WAS PROPERLY DISMISSED IN ACCORDANCE WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The Petitioner raised an issue of procedural due process on the basis of a perceived "liberty" interest. In support of this argument, the Petitioner characterizes his case as that of an at-will public employee "accused of corruption" and then demoted. This characterization is flawed at best. Because the Petition for Writ of Certiorari asserts that the lower courts improperly decided the Petitioner's due process claim, it is necessary to address those misstatements which may have a bearing on the question of whether the issue could properly be before the Court if certiorari is granted.

It is acknowledged that the Petitioner is an at will public employee, and as such, is not afforded a property interest in his former position as Chief of Police for the City of Altoona. It

is also true that the Petitioner was demoted on March, 1989 from the position of Police Chief to that of Sergeant, the position he had previously held. However, the Petitioner's Complaint does not allege, and there is no basis in the record to support the finding, that the Petitioner's demotion was the result of a public charge of corruption. Because there is no support in the record for this contention, certiorari may not properly be granted on this issue.

In the seminal case of Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), this Court recognized that a government employee's liberty interest may be implicated where the government dismisses him based on charges "that might seriously damage his standing and associations in the community" or that might impose "on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." However, this Court has declined to extend the protections of the Due Process Clause of the 14th Amendment in that case to a situation involving the termination of an at-will public employee where there was no public disclosure of the reasons for the discharge. In Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), the police officer's termination was not found to implicate any liberty

interest where the charges giving rise to the discharge were not publicized other than to orally communicate them to the police officer privately and later provide the reasons in response to the subsequent litigation instituted by the officer. The truth or falsity of the underlying charges was deemed to be irrelevant if they were not publicized. This Court noted "a contrary evaluation. . . would enable every discharged employee to assert a constitutional claim merely be alleging that. . . the supervisor made a mistake. The Federal Court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Id. 426 U.S. at 349, 96 S.Ct. at 2080.

This interpretation has been consistently followed by the Courts of Appeal. See, Roley v. Pierce County Fire Protection District #4, 869 F.2d. 491 (9th Cir. 1989) (charges of incompetence or inability to get along with others may reduce economic rewards but do not warrant constitutional procedural protection); Kelly Kare Ltd. v. O'Rourke, 930 F.2d 170 (2d Cir. 1991) (innuendo which may stem from a without cause termination of a public contract does not amount to a deprivation of a liberty interest); Brandt v. Board of Cooperative Educational Services, 820 F.2d 41 (2d Cir. 1987) (where the reasons for an employees

termination are kept private, the "public disclosure" requirement has not been met).

While charges of corruption in conjunction with the termination of a governmental benefit may implicate the due process clause of the 14th Amendment, the underlying facts of this case do not support this scenario. Petitioner's Complaint does not allege that any charges of wrongdoing were made in conjunction with his demotion but only that the Petitioner sought to schedule a news conference to publicly proclaim the absence of wrongdoing. (Appendix A-24a)

As set forth in the Petitioner's statement of the case, at the time of the Petitioner's demotion in March 1989, there were no charges of corruption or misconduct levied against him. To the contrary, the Mayor specifically refused to comment on the issue. The Petitioner's argument would essentially extend the protections of the Due Process Clause to all public employment decisions, even where no charges of misconduct, incompetence or otherwise are publicized.

As set forth by this Court in Codd v. Velger, 429 U.S. 624, 627, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977), where the liberty interest involved is a stigmatization of a non-tenured

employee in the course of the decision to terminate his employment, the hearing required by the Due Process Clause is solely "to provide the person an opportunity to clear his name." Where the employee does not have a property interest in his employment, the hearing need not address the adequacy or even the reasons for the decision to terminate him. In conformity with the decision in Bishop v. Wood, supra., there is necessarily no need or right to a hearing if the stigmatizing charges are not publicized since there is no need for the employee to clear his name. Since the underlying facts of this case cannot support the issue presented, the Petition for Writ of Certiorari on the basis of the due process question should be denied.

In addition, the merits of the Petitioner's contentions do not rise to the level to require review by the United States Supreme Court in any event. Rule 10 of the Rules of the Supreme Court of the United States, U.S. Sup. Ct. Rule 10, 28 U.S.C.A., provides that a Petition for Writ of Certiorari will be granted "only when there are special important reasons therefore". In support of the Petition, the Petitioner asserts that the decision of the Court of Appeals for the Third Circuit is not in accord with the applicable decisions of this Court. As a basis for this argument, the Petitioner

points to the case of Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). A thorough review of this decision reveals that there exists no inconsistency.

In Paul v. Davis, this Court provided an exhaustive review of its prior decisions concerning the liberty interest in order to resolve the question of whether an injury to reputation, standing alone, was enough to implicate the protections of the Due Process Clause of the 14th Amendment. In reaching its decision that a liberty interest was not implicated, the Court engaged in a two part analysis. First, the Court addressed the premise that the Due Process Clause of the 14th Amendment and 42 U.S.C. §1983 made federally actionable wrongs inflicted by the government which had previously been thought to constitute only state law tort claims. Since there is no specific constitutional guarantee protecting the interest of one's reputation, this argument was summarily rejected as an attempt to superimpose a body of federal tort law on systems already administered by the states. 424 U.S. at 701, 96 S.Ct. at 1160.

The second premise addressed by the Court - "that the infliction by state officials of a 'stigma' to one's reputation is somehow different in kind from infliction by state officials of harm

to other interests protected by state law" - was found to be equally untenable. 424 U.S. at 701, 96 S.Ct. at 1160. It is, however, on this issue that the Petitioner attempts to distinguish his case. After exhaustively reviewing the prior decisions in which a "liberty" or "property" interest were found under the Due Process Clause, the Court held

> "In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interests from the recognition of protection previously afforded by the State, which we found sufficient to envoke the procedural guarantees contained in the due process clause of the 14th Amendment. But the interest in reputation alone which respondent seeks to vindicate in this action in Federal Court is quite different from 'liberty' or 'property' recognized in those decisions."

424 U.S. at 711, 96 S.Ct. at 1165. The Petitioner points to the observation by the Court that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of Petitioner's actions", as support for the contention that Paul v. Davis would recognize a federal action for defamation where the state does extend to its citizens a legal guarantee of the right to his reputation, as found in

the Pennsylvania Constitution. Pa. Const. art. I, §1.

This reading of Paul v. Davis ignores the clear admonition that harm or injury to one's reputation interest does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change in status as theretofore recognized under the state law. 424 U.S. at 712, 96 S.Ct. at 1166. This Court specifically rejected the Petitioner's contention that the Due Process Clause of the 14th Amendment provides a federal tort remedy for every injury to reputation by a state officer. The Petitioner's interests in his reputation are protected to the same extent under the laws of the Commonwealth of Pennsylvania as they had been previously. The Respondent's actions have not altered that right or the protections provided by state law to a tort remedy.

To read Paul v. Davis any other way would grant residents of Pennsylvania unlimited recourse to federal actions not only in a defamation suits, but as to any infringement by the government on the right to happiness which is also granted under the Pennsylvania Constitution at Article I, Section 1. Not only is there no authority for such a result, the decisions of this Court explicitly refute this contention.

Finally, the Petitioner argues that the lower court erred in determining that the Petitioner did not have a "right or status" under state law which was altered or extinguished and contends that this holding strips at-will government employees of appropriate recourse against adverse employment actions. It is granted that this Court previously found that a right to government employment may be afforded due process protection where the employment has been terminated or there has been a refusal to rehire based upon charges or dishonesty or immorality. Board of Regents v. Roth, supra. In determining that there must be some alteration or extinguishment of the right or status accorded by state law, in conjunction with an allegedly defamatory publication, in order to obtain constitutional status, this Court noted in Paul v. Davis, supra. "certainly there is no suggestion in Roth to indicate that a hearing would be required each time the state in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee". 424 U.S. at 712, 96 S.Ct. at 1165.

There is no due process protection afforded to every government employee which would cover every employment decision. The liberty interests protected in this line of cases is the

right to government employment itself, not the right to a particular job with the government. This interest is recognized for at-will employees only in those situations where charges against an employee in conjunction with the

decision to terminate or not to rehire actually altered or extinguished the right to further employment with the government. Where the stigma attached to an allegation of misconduct results in foreclosure of other possibilities of government employment , a liberty interest in implicated. Similarly, the right to attend school in Ohio could not be infringed upon based on charges of misconduct without the procedural safeguards of the 14th Amendment, Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) and the status of a parolee cannot be altered because of an alleged parole violation without due process. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 44 (1972). It is the extinguishment or alteration of the underlying right which is afforded due process protection.

In this case, the District Court found that there had been no extinguishment or alteration of the Petitioner's right to employment with the government. Since the Petitioner had no state guarantee in his position of police chief, the demotion to the

position of sergeant implicated neither a property or liberty interest. The Petitioner retained the right to government employment as evidenced by his demotion within the department, as well as his subsequent employment with the State Crimes Commission. This decision is consistent with other Third Circuit Court of Appeal decisions and Court of Appeal decisions in other Circuits. Clark v. Township of Falls, 890 F.2d 611 (3d Cir. 1989); Sturm v. Clark, 835 F.2d 1009 (3d Cir. 1987); Morrash v. Strobel, 842 F.2d 64 (4th Cir. 1987), as well as the United States Supreme Court decisions. As stated in Board of Regents v. Roth, supra, it would stretch the concept of a liberty interest too far "to suggest that a person is deprived of 'liberty' when he simply is not rehired at one job but remains as free as before to seek another." 408 U.S. at 575, 92 S.Ct. at 2708.

The decisions of the District Court and Third Circuit Court of Appeals in this case are consistent with prior decisions of this Court and the Petitioner has failed to set forth any other reason to grant a Writ of Certiorari in this issue.

SECTION II

THE ENTRY OF JUDGMENT IN FAVOR OF THE RESPONDENTS ON A MOTION FOR DIRECTED VERDICT ON THE PETITIONER'S FIRST AMENDMENT CLAIMS WAS IN COMPLIANCE WITH PRIOR DECISIONS OF THIS COURT.

The Petitioner has formulated this issue as an inquiry into whether the imposition of a "gag order" on a public employee by his employer may give rise to a cause of action for a violation of the employee's First Amendment rights. As stated, this appears to be a case where the plaintiff's case was dismissed for failure to state a claim. However, in this case, Petitioner's claims were not preliminarily dismissed but judgment was entered in favor of the Respondents on the Petitioner's First Amendment claim after the Petitioner had entered his case before the jury on a Motion for Directed Verdict by the Respondents. By Order dated January 18, 1991, which amended the Court's Memorandum Opinion on the Motion for Directive Verdict of the prior day, the District Court specifically addressed the issue of the sufficiency of the Petitioner's claims. First, the Court found that the Petitioner neither raised not

tried the issue of a First Amendment claim for the imposition of the "gag order". In his Pretrial Narrative Statement, the Petitioner's Response to Motion for Summary Judgment and in his case in chief, the Court found that the Petitioner raised only the claim of retaliatory discharge for the exercise of his First Amendment rights, and not the claim that the directive issued by the Mayor was a violation of his rights separate and apart from the discharge. Secondly, the Court found that even if the Petitioner had raised this issue, the Petitioner did not meet his burden of establishing that a violation existed. The question presented to this Court is not whether a cause of action could exist for violation of First Amendment rights under the scenario proposed by the Petitioner, but whether the lower court appropriately determined that the Petitioner had failed to meet his burden of proof. This issue is much more limited than that stated by the Petitioner.

It is acknowledged that a "public employee does not relinquish First Amendment rights to comment on matters of public interests by virtue of government employment." Connick v. Myers, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983). However, it has also been recognized that "the state has interests as an employer in regulating speech of its employees

that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). As a result, this Court has consistently required a balancing analysis to be performed between the interests of the employee in commenting on issues of public concern and the interests of the public employer in promoting the efficiency of its services. Id.

The District Court examined this issue in detail, even though the Court was of the view that the claim had not been raised or tried by the Petitioner. The Court found that the Petitioner's prohibited speech was not on a matter of public concern but that the evidence indicated only that the Petitioner intended to vindicate himself. As noted by this Court in Connick v. Meyers, supra.

> "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a Federal Court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

461 U.S. at 147, 103 S.Ct. at 1690. The District Court's determination was totally in accord with this Court's prior dictates.

In addition, the District Court opined that even if Petitioner's speech was on a matter of public concern, the City's interests in protecting the orderly operation of the Police Department and City government outweighed those of the Petitioner. At trial, the Petitioner's own case established that the Petitioner himself had participated in drafting specific rules and regulations proscribing police officers' public commentary to the press and that the Petitioner was under severe restrictions, imposed by outside agencies, to speak on investigations within the community. The lower court correctly determined that the City's legitimate concern about Petitioner's public commentary on sensitive subjects and internal affairs, which were already affecting officer morale, clearly outweighed his desire for immediate vindication.

The Petitioner argues as an alternative basis that the alleged violation of his First Amendment rights serves as a basis to pursue his due process claim under Paul v. Davis, supra. This argument was not raised before either the District Court or the Third Circuit Court of Appeals and neither Court had an opportunity to pass on this issue. As such, it is an improper issue for review by this Court. City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In addition, as it is formu-

lated, the Petitioner's argument is unresponsive to the issue presented.

SECTION III

THE LOWER COURT APPROPRIATELY GRANTED THE MOTION FOR DIRECTED VERDICT WHERE THE PETITIONER FAILED TO ESTABLISH THAT THE PETITIONER'S PROTECTED CONDUCT WAS A MOTIVATING FACTOR IN HIS DEMOTION.

A public employee may have a claim under the First and Fourteenth Amendments of the United States Constitution "if the decision to terminate was made by reason of the exercise of constitutionally protected First Amendment freedoms." Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33L.Ed.2d 570 (1972). In order to determine whether First Amendment activity was a reason for an adverse employment decision this Court has set forth essentially a three part analysis. Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). First, a plaintiff must establish that he is engaged in protected First Amendment activity. Second, the plaintiff must demonstrate that the activity was a substantial or

motivating factor to the action taken against him. Lastly, the defendant may defeat the claim by proving that the same action would have been taken even in the absence of the protected activity. As recognized by this Court, it is not sufficient that the plaintiff only show that the protected conduct was a factor in the decision.

> "A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in the decision not to rehire, could place an employee in a better position in the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . .[I]t would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision - even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of his decision."

429 U.S. at 285 - 286, 97 S.Ct. at 575. The rule of causation implemented by this Court is intended to distinguish between "a result caused by a constitutional violation and one not so caused." Id.

In this case, at the conclusion of his case in chief, the District Court determined that the Petitioner had failed to support the claim that the decision to demote him was the result of any protected conduct on his part. The Court found that the evidence, even as presented by the Petitioner, established that the Mayor was motivated by factors other than insubordinate disclosure of the March 7 directive, factors which were communicated to members of City Council long before March 7. As recognized in the Court's Memorandum Opinion, virtually every witness called on behalf of the Petitioner testified about the animosity and ill will between the Petitioner and the Mayor and the Mayor's intentions to demote the Police Chief long before the alleged protective conduct occurred. The Petitioner argues that the insubordinate disclosure provided the Mayor the "excuse" needed to demote the Petitioner. This argument was rejected by the District Court, not only because the Mayor needed no excuse to demote an at will employee, but because the Petitioner presented no evidence that the Mayor

sought the approval of the Council or that the demotion "was any more satisfactory to Council members after the insubordination than before." (Appendix A-13a) If it was the Petitioner's contention that the disclosure of the March 7 directive was a motivating factor in the Mayor's decision to demote him because the Mayor wanted to avoid the pressure from the public and Council which accompanied the prior demotion, it was the Petitioner's burden to offer some evidence to support that theory.

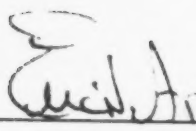
The Petitioner proposes that the District Court's decision will enable employers to utilize pretextual means to resolve employment decisions involving marginal candidates. However, a review of the District Court's decision reveals that the Petitioner was not a borderline or marginal candidate, in the eyes of the Mayor, the sole arbitrator in this case, and that the motivating reasons for the demotion were all factors which were afforded no constitutional protections. As an at will employee, the Petitioner could be demoted for no reason or any reason, except those that would infringe on his constitutional rights. The fact that the Petitioner's employment could be affected for reasons other than for "just cause" does not mean that an at will employee's protections under the First Amendment are in any way diminished.

Finally, Petitioner argues that the decision of this Court in Mount Healthy City School District v. Doyle, supra. requires the lower court to proceed through all three parts of the First Amendment analysis, and would require the employer in this case to present testimony as to the reasons for the Petitioner's demotion. This conclusion is not supported by a reading of the case, and would result in an undue waste of judicial resources in situations such as this. While an arguable First Amendment claim may require an employer to show that it would have reached the same decision even in the absence of the protected conduct, where a plaintiff provides all of the information necessary to determine whether there was a viable claim, the Court is within its discretion to grant a directed verdict. It is clear from the District Court's Memorandum Opinion that the Court found not only that the Petitioner had failed to show that the protected conduct was a substantial factor in the decision to demote the Petitioner, but that the Petitioner's case itself supported the determination that the demotion would have occurred even in the absence of the protected conduct. If this decision can be made on the basis of only the plaintiff's case, there is no requirement that the trial court continue to take testimony.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

MEYER, DARRAGH, BUCKLER, BEBENEK & ECK

BY: 

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PETER N. STARR,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No. 89-53 Johnstown**
v.	)	
	)	
THE CITY OF ALTOONA,	)	
and ALAN R. MIKULA,	)	
MAYOR	)	
	)	
Defendants.	)	

ORDER

AND NOW, this 18th day of January, 1991, IT IS ORDERED that this court's memorandum opinion filed January 17, 1991, in the above case is AMENDED by the addition of footnote A at the end of the first full paragraph on page 2 of said opinion, which reads as follows:

A. Starr might have claimed that defendants violates his rights by the very imposition of the May 7, 1989, directive discussed infra. That directive, lasting only sixteen days, instructed Starr not to speak with the press, be photographed or

video-taped. Plaintiff, however, did not try or present the case on those grounds. As evidenced by his pre-trial narrative statement, his opposition to defendants' motion for summary judgment and his case in chief, plaintiff only addressed the constitutionality of the directive in the context of the retaliatory demotion claim; in other words, as the first prong of the Trotman test.

We do note however, that even though the directive may be characterized as a prior restraint, the analysis of whether the directive itself infringed upon Starr's First Amendment rights still concerns the relationship between the First Amendment and public employers, and such analysis is based upon the same principles as the first prong of Trotman. See Clark v. Township of Falls, 890 F.2d 611, 620-22 (3d Cir. 1989). Thus, whether the directive itself violated Starr's first amendment rights is a question of law for the court. Lees v. West Greene School Dist., 632 F.Supp. 1327 (WD Pa 1986); Johnson v. Lincoln University, 776 F.2d 443, 450 (3d Cir. 1985). In determining whether the directive was unconstitutional, the first inquiry is whether the prohibited speech was on a matter of public concern. Id.; Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138 (1983). Plaintiff introduced no evidence as to the public's concern

with the matters he would be speaking about. He was not about to criticize the police operation. He has not stated that he wanted to inform the public of improper actions by the Mayor. The only evidence suggests that he simply wanted to vindicate himself, and that is not necessarily a matter of public concern. Plaintiff's subjective intent is among the many factors guiding our determination. Schalk v. Gallemore, 906 F.2d 491 (10th Cir. 1990).

Furthermore, even if plaintiff would have spoken on a matter of public concern, we must next balance his desire to speak with the Mayor's need to protect orderly operation of government. Even if Starr's comments would have been on matters of public concern, we feel that the temporary directive, ordering Starr not to hold any press conferences or communicate with the press, did not unduly infringe upon his rights. The parties to this action are two of the highest ranking city officials; they commonly must keep silent about various developments. The police chief himself had a hand in writing speech-restricting regulations applicable to Altoona police officers. Given the Mayor's intention to demote Starr, it was entirely reasonable to prevent Starr from commenting on or compromising matter he may have had knowledge of as police chief. See Breuer v. Hart, 909 F.2d 1035 (7th Cir. 1990).

Finally, we question whether the relief Starr seeks - money damages - is proper. Rather than obeying a directive he thought illegal and then waiting to collect money for the damage to his reputation which could have continued indefinitely, it was probably incumbent upon Starr to either violate the directive or seek injunctive relief. Although Starr did seek to enjoin enforcement of the directive, that issue became moot when the directive was lifted on March 23, 1989.

/s/ Glenn E. Mencer
Glenn E. Mencer
United States District Judge